SUBJECT INDEX

	Pages
Jurisdiction	1
Argument and Citation of Authorities	3
The Rule that Assessments Must be Based Upon Special Benefits is not Applicable to Street Railways Occupying Streets	3
No Unfair Discrimination against Appellants	7
The Evidence Offered by Appellants, and Rejected by the State Courts, Tending to Show No Direct Benefits, was Wholly Irrelevant	10
Cases and Authorities Relied upon by Appellants Distinguished	12
Appendix, Georgia code, 1926, Section 2600	13

ALPHABETICAL LIST OF CASES AND AUTHORITIES CITED IN BRIEF

	Pages
Alabama Traction Company v. Selma Trust & Savings Bank, 104 S. 517	9
Appendix, Georgia Code, Section 2600	13
Atlantic & Gulf Railroad Company v. State of Georgia, 98 U. S. 359	4
Corpus Juris, vol. 44, page 877, section 3585	9
Durham Public Service Company v. City of Durham, 261 U. S. 149, 154	4, 7, 8
Fairhaven & Westville Railroad Company v. City of New Haven, 203 U. S. 379, 389, 390	3, 5
Fort Smith Light & Traction Company v. Board of Improvement of Paving District No. 16 of Fort Smith, 274 U. S. 387	3, 5, 10
Georgia Code, 1926, Section 2159	4
Georgia Code, Section 2239	4
Georgia Code, Section 2600	3, 4, 13
Georgia Code, Section 6553	7
Georgia Laws, 1919, page 934, et seq	1
Georgia Laws, 1924, page 534, et seq	1
Georgia Power Company v. City of Decatur, 168 Ga. 705	11
Georgia Power Company v. City of Decatur, 173 Ga. 219 (2)	8

	Pages
Georgia Power Company v. City of Decatur, 281 U. S. 505, 510	11
Georgia Railway & Electric Company v. Town of Decatur, 29 Ga. App. 653, 654 (4)	8
Georgia Railway & Power Company v. Town of Decatur, 262 U. S. 432	11
Georgia Railway & Power Company v. Railroad Commission of Georgia, 149 Ga. 1	11
Georgia Railway & Power Company v. Town of Decatur, 152 Ga. 143	11
Georgia Railway & Power Company v. Town of Decatur, 153 Ga. 329	11
Hayden v. City of Atlanta, 70 Ga. 817	7
Milwaukee Electric Railway & Light Company v. State of Wisconsin, 252 U. S. 100 (2)	10
Sioux City Street Railway Company v. Sioux City, 138 U. S. 98, 106, 107	4, 6
Speer v. Mayor and Council of Athens, 85 Ga. 49	7
West End & Atlanta Street Railroad Company v. Atlanta Street Railroad Company, 49 Ga. 151 (6 & 7)	4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 570

THE GEORGIA RAILWAY AND ELECTRIC COMPANY, GEORGIA RAILWAY AND POWER COMPANY, and GEORGIA POWER COMPANY

APPELLANTS

vs.

CITY OF DECATUR

APPELLEE

BRIEF OF APPELLEE

I.

Jurisdiction

We are advised by the clerk that the Court reserved the consideration of the question of jurisdiction until the hearing of the case on the merits.

We respectfully submit that the questions involved in the case under the assignment of errors have been so plainly foreclosed by the decisions of this Court that there is now involved no substantial federal question. The questions involved and the decisions referred to will be pointed out in this brief.

The questions raised by the assignment of errors are:

(1) Whether, as construed and enforced by the courts of the State of Georgia, the provisions of the charter of the City of Decatur, as amended by Georgia laws, 1919, page 934, et seq., and Georgia laws, 1924, pages 534, et seq., conferring upon the city the power to improve and pave the streets of said city and to assess against street railway companies, having tracks thereon, the cost of paving and improving the por-

tions of streets occupied by the tracks of such companies and for two feet on each side thereof, are violative of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, because:

(a) said charter provisions permit assessments for street paving and improvements against street railway companies without regard to any special benefits to their property, in said streets; whereas, as to owners of abutting property, assessments for street paving and improvements must be based upon special benefits to such abutting property, and must not be out of proportion to such special benefits; and,

(b) assessments against street railway companies under said charter provisions are *in personam* and enforceable against all property of such companies, whereas such assessments as against abutting real estate are *in rem* and are enforceable solely against such abutting real estate.

(2) Whether the rulings of the state courts rejecting, as irrelevant, evidence offered by appellants tending to show the absence of special benefits to the property of appellants from the paving of the street, for which the assessment was levied, amounted to a denial to appellants of due process of law and the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

(3) Whether the ruling of the state courts rejecting, as irrelevant, evidence tending to show that the particular street car line of appellants operated over tracks occupying a portion of the street, for the pavement and improvement of which the assessment was levied, was unprofitable for operation and could not be made profitable for the reason that the rate of fare—fixed by contract for that particular line (R. 87)—was so low as not to permit of its being operated at a profit, amounted to a denial to appellants of due process of law and the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

(4) Whether the ruling of the state courts rejecting, as irrelevant, evidence to the effect that the appellants had of-

fered to surrender to the City of Decatur the franchise for the operation of the particular street car line operated over the street, for the pavement of which the assessment was levied, and to abandon the operation of that line; denied to the appellants due process of law and the equal protection of the law in violation of the Fourteenth Amendment.

ARGUMENT AND CITATION OF AUTHORITIES RELIED ON

I.

The Rule That Assessments Must Be Based Upon Special Benefits Is Not Applicable to Street Railways Occupying Streets.

The general rule that assessments against abutting owners for street improvements are sustainable only to the extent of special benefits to abutting property is not applicable to street railway companies having tracks in the street improved. As to the latter such assessments may be made under the reserved power to alter or amend charters; and, in Georgia, under the express provisions of the law (Georgia code, section 2600) under which street railway companies are chartered and are permitted to construct their railways within towns or cities.

It is well settled by the decisions of this Court that assessments against street railway companies for street improvements, in respect of streets occupied by their tracks, are sustainable, not upon the theory of special benefits to their property (as in the case of abutting owners), but upon the principle that the state has the power to make reasonable classifications, and to impose different burdens upon different classes, and the power to alter or amend corporate charters.

Fort Smith Light & Traction Company v. Board of Improvement of Paving District No. 16 of Fort Smith, 274 U. S. 387;

Fairhaven & Westville Railroad Company v. City of New Haven, 203 U. S. 379;

Sioux City Street Railway Company v. Sioux City, 138 U. S. 98;

Durham Public Service Company v. City of Durham, 261 U. S. 149.

In Georgia, the power is reserved to the State to withdraw, alter, or amend private charters.

Atlantic & Gulf Railroad Company v. State of Georgia, 98 U. S. 359;

West End & Atlanta Street Railroad Company v. Atlanta Street Railroad Company, 49 Ga. 151 (6 and 7);

Georgia code, 1926, *section* 2159, provides:

> "Persons are either natural or artificial. The latter are the creatures of the law, and, except so far as the law forbids it, subject to be changed, modified, or destroyed, at the will of their creator; they are called corporations."

Georgia code, section 2239, provides:

> "In all cases of private charters hereafter granted, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter."

Georgia code, section 2600, provides that:

> "No street-railroad incorporated under this division shall be constructed within the limits of any incorporated town or city without the consent of the corporate authorities: And provided further, that all such street-railroad companies incorporated under this division shall be subject to all just and reasonable rules and regulations by the corporate authorities, and liable for all assessments and other lawful burdens that may be imposed upon them from time to time."

(This entire section is set out as an appendix to this brief.)

This Court in **Fort Smith Light & Traction Company v. Board of Improvement of Paving District No. 16 of Fort Smith, supra,** held:

> "Constitutional power reserved to the legislature to alter any corporate charter permits the imposition upon a street railway company of the cost of street paving without violating the constitutional provision against impairing the obligation of contracts, although the provision was not in its franchise contract. (Headnote 2.)
>
> "The imposition upon a street railway company of the cost of street paving which its franchise contract does not require it to meet does not unconstitutionally deprive it of property without due process of law, since it might have been included in the original charter, and has a reasonable relation to the object of the grant and the duty of the state to maintain its highways." (Headnote 3.)

In **Fair Haven & Westville Railroad Company v. City of New Haven, supra,** this Court held:

> "The imposition upon street railway companies by Conn. act of July 1, 1895, of the cost of paving and repaving that part of the streets occupied by their tracks, is a valid exercise of the power reserved by the state to alter or amend the charter of a street railway company, which required such company to keep the street between its tracks and 2 feet on each side in good and sufficient repair." (Headnote 2.)

In the opinion of Mr. Justice McKenna, it was said:

> "Does the change and increase of burden upon the plaintiff in error come within the limitations upon the reserved power of the state? Has it no proper relation to the objects of the grant to the company or any of the public rights of the state? Can it be said to be exercised in mere oppression

> and wrong? All of these questions must be answered in the negative. The company was given the right to occupy the streets. It exercised this right first with a single track, and afterwards with a double track. Before granting this right the state certainly could have, and reasonably could have, put upon the company the duty of paving as well as of repairing. Such requirement would have been consistent with the object of the grant. It is yet consistent with the object of the grant. It is not imposed in sheer oppression and wrong, and the good faith of the state cannot be questioned. It is imposed in the exercise of one of the public rights of the state,—the establishment, maintenance, and care of its highways." (Pages 389, 390.)

In **Sioux City Street Railway Company v. Sioux City, supra,** this Court held that under the provisions of the Iowa code:

> "the legislature has power to repeal and amend the articles of incorporation of a company, and to impose any conditions upon the enjoyment of its franchise which the General Assembly may deem necessary for the public good." (Headnote 1.)

In the opinion of Mr. Justice Blatchford on this subject, it was said:

> "The Company took its franchise subject to such legislation as the State might enact. This is plain from the provision of section 1090 of the Code. The Company took its charter subject to the provisions of that section. The General Assembly deemed it necessary for the public good to require street railways to pay for the paving of one foot outside of the tracks, probably upon the view that it was right that they should be required to pave that part of the street which they used almost exclusively. It was

not in the power of the City, by any contract with the Company, to deprive the Legislature of the power of taxing the Company. * * *

"Under section 1090 of the Iowa Code, the Legislature had the power not only to repeal and amend the articles of incorporation of the Company, but to impose any conditions upon the enjoyment of its franchise which the General Assembly might deem necessary for the public good. The reservation of this power was a condition of the grant." (Pages 106, 107.)

II.

No Unfair Discrimination Against Appellants

It is not unfair discrimination against a street railway company, which occupies with its tracks a portion of a street, to require such company to pay a fair portion of the cost of paving such street, although there is no immediate or direct benefit to its property on such street from such improvement, and although assessments against abutting property owners must be based upon special benefits to such abutting property.

Durham Public Service Company v. City of Durham, 261 U. S. 149.

The provision of the Georgia Constitution (Georgia code, section 6553) requiring uniformity of taxation is not applicable to special assessments for local improvements.

"Such assessments are not taxes within the meaning of the constitution."

Hayden v. City of Atlanta, 70 Ga. 817;

Speer v. Mayor and Council of Athens, 85 Ga. 49.

The contention that there is unjust discrimination as against the appellants because assessments for street improvements as against abutting property are *in rem* and are sustainable only where there are corresponding special benefits, whereas, under the provisions of the charter and ordinances of the City

of Decatur, the assessments against appellants are *in personam* and not based upon any immediate, or special, benefits to the property of appellants, is obviously unsound. This contention is completely answered by the decision of this Court in **Durham Public Service Company v. City of Durham, supra,** where it was held that:

> "The power of the legislature to make reasonable classifications and to impose a different burden upon the several classes cannot be denied. There are obvious reasons for imposing peculiar obligations upon a railway in respect of streets occupied by its tracks." (page 154).

In that case the abutting property was valued at more than $5,000,000.00 and the assessments against the owners thereof amounted to approximately $89,000.00; whereas the entire value of the street railroad upon the street improved was $100,000.00 and the assessment against the street railroad company was $102,000.00.

The contention that there is unjust discrimination as against the appellants because the charter provision, as construed by the Georgia courts, makes the assessment as against the appellants a general charge against all their property, whereas as to abutting property owners the assessments are *in rem* against the abutting property only, is answered by the decision of the Supreme Court of Georgia holding that the property of the appellants is not subject to levy and sale.

> *Georgia Power Company v. City of Decatur,* 173 Ga. 219 (2).

As stated by Judge Bell in the case of *Georgia Railway & Electric Company v. Town of Decatur,* 29 Ga. App. 653:

> "A construction of the act as applicable only to a levy and sale of the property of the railway company abutting upon or contiguous to the improvement would be the equivalent of holding it meaningless or ineffective." (Headnote 4.)

Clearly, the enforcement of the assessment against the appellants could not be accomplished by the same method as that prescribed as to abutting property. Even if the law permitted a segment of the track to be levied upon and sold, it is hardly likely that it would bring the amount of the assessment.

The Supreme Court of Alabama, in *Alabama Traction Company v. Selma Trust & Savings Bank*, 104 So. 517, in discussing this question, said:

> "But the statute recognizes the street railway track is not an abutting property assessable for special benefits thereto. The railway company has no abutting property in that sense. Moreover, it recognizes the general policy forbidding the enforcement of liens against a segment of a track or other items of property devoted to public use tending to disconnect or dismantle the plant and prevent the performance of public duty."

The court further said:

> "The cost of paving the street railway is declared a personal obligation of the company, a condition upon its right to have and enjoy a franchise. The lien is declared upon the entire property as security for this tax or demand."

In *44 C. J. 877, section 3585,* the law is stated as follows:

> "When the property assessed is that of a railroad company and essential to the operation of the road, it will not be ordered sold to satisfy the lien (assessment lien), but the court will award a personal judgment to be collected as an ordinary judgment at law."

III.

The Evidence Offered by Appellants, and Rejected by the State Courts, Tending To Show No Direct Benefits, Was Wholly Irrelevant.

The appellants sought to escape the assessment by contending and offering to prove that the particular street car line operated over tracks occupying a portion of the street, for the improvement of which the assessment was made, was unprofitable, and could not be operated at a profit, because of a contract limiting the fare that might be charged. They sought also to show that they had offered to surrender to the City of Decatur the franchise for the operation *of this particular line only* (R. 87), and to abandon its operation. They offered this as evidence of the fact that the amount of the assessment was more than the value of the entire property. It is respectfully submitted that this evidence was not relevant and that there was no denial to the appellants of due process of law or equal protection of the law in excluding the same.

In **Fort Smith Light and Traction Company v. Board of Improvement of Paving District No. 16 of Fort Smith, 274 U. S. 387,** it was held:

> "The imposition of burdens otherwise legitimate upon a public service corporation cannot be held invalid as confiscatory because the permitted rate for its service does not allow an adequate return, and therefore a street railway company cannot avoid payment of a street paving assessment because it loses money in the operation of its road at the rate allowed." (Headnote 4.)

In **Milwaukee Electric Railway & Light Company v. State of Wisconsin, 252 U. S. 100,** it was held:

> "A street railway company's contractual duty to repave that part of a street which lies between its tracks and for 1 foot outside cannot be evaded on

the theory that this additional burden will reduce its income below a reasonable return on the investment." (Headnote 2.)

The rate of fare which appellants are permitted to charge on this particular line is fixed by contract. (R. 87.) This contract is still binding upon the appellants.

Georgia Power Company v. City of Decatur, 281 U. S. 505.

The offer of appellants to surrender their franchise for this particular line and to abandon its operation is just another effort on their part to repudiate their contract—the 5¢ fare contract—with the City of Decatur. They have endeavored in various ways and on various occasions to do this, but the courts have consistently held that they are bound by the contract.

Georgia Railway and Power Company v. Railroad Commission of Georgia, 149 Ga. 1;

Georgia Railway and Power Company v. Town of Decatur, 152 Ga. 143;

Georgia Railway and Power Company v. Town of Decatur, 153 Ga. 329;

Georgia Power Company v. City of Decatur, 168 Ga. 705;

Georgia Railway and Power Company v. Town of Decatur, 262 U. S. 432;

Georgia Power Company v. City of Decatur, 281 U. S. 510.

While under our view of the matter it is immaterial whether appellants proposed to surrender to the City of Decatur "all of its railway property and franchises located within the municipality," as asserted in appellants' brief, on page 6, the record shows that the only proposal along this line was to surrender the franchise for "the particular line" affected by the 5¢ fare contract and remove the tracks of that line (R. 93-101).

Cases and Authorities Relied Upon by Appellants Distinguished.

It is respectfully submitted that none of the authorities relied upon by appellants as supporting their contention that the assessment is invalid because of the lack of special benefits are applicable to this case. We do not dispute the proposition that as to abutting real estate local assessments for street improvements cannot exceed the benefits to the property assessed. All of the cases and authorities cited and relied upon by appellants are to this effect. None of them dealt with a situation similar to the one involved here; that is, where a portion of a public street is occupied by the tracks of a railroad company under a special franchise or permit. The distinction seems to us to be obvious.

Respectfully submitted,

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APPENDIX

Georgia Code, 1926, Section 2600

DIVISION 4

Street-Railroads

Section 2600. *Street Railroads, How Incorporated.*—All the provisions of the preceding division shall govern in the incorporation, control, and management of suburban and street-railroad companies, in so far as the same are applicable and appropriate thereto. Any number of persons, not less than ten, who desire to be incorporated for that purpose, may form a company as provided in the preceding division, with this additional requirement: That they must in their petition specify what city, town, or village, and in what streets thereof, they propose to construct and build said railroad: Provided, that no street-railroad incorporated under this division shall be constructed within the limits of any incorporated town or city without the consent of the corporate authorities: And provided further, that all such street-railroad companies incorporated under this division shall be subject to all just and reasonable rules and regulations by the corporate authorities, and liable for all assessments and other lawful burdens that may be imposed upon them from time to time: And provided further, only such of the powers and franchises that are conferred by said divisions shall belong to said street-railroad companies as shall be necessary and appropriate thereto; and in case any street-railroad incorporated under this division shall be partly located in an incorporated town or city and partly located in the country, then the provisions of the preceding division which apply to other railroads located in the country shall apply to it so far as that portion of its road is concerned: And provided further, that nothing in paragraph 2594 of the preceding division, which provides that the gen-

eral direction and location of railroads sought to be constructed in this State shall be ten miles from a railroad constructed or laid out and selected to be constructed, shall be or be held applicable to electric street, suburban, or interurban railways, or the selection of the route or the construction of the same. Acts 1894, pp. 69, 70; 1903, p. 38.